Supreme Court, U.S.
FILED
SEP 14 2000
CLERK

(3)

No. 99-2077

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR NORTHEASTERN ILLINOIS UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARK T. DUNN
Counsel of Record
DUNN, STANCZAK & WILLARD
1001 North Main Street
Bloomington, IL 61702-3488
(309) 828-6241

CHRISTIAN M. POLAND
ROSS & HARDIES
Suite 2500
150 North Michigan Avenue
Chicago, IL 60601-7567
(312) 750-5753

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1499

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Board of Governors of State Colleges and Universities for Northeastern Illinois University was an arm and agency of the State of Illinois and is the legal predecessor of the Board of Trustees of Northeastern Illinois University. The Board of Trustees of Northeastern Illinois University is also an arm and agency of the State of Illinois. The Board of Governors of State Colleges and Universities for Northeastern Illinois University was dissolved effective January 31, 1996 and the Board of Trustees of Northeastern Illinois University succeeded to all the rights and liabilities of that entity on January 1, 1996.

TABLE OF CONTENTS

Page

Parties to the Proceeding and Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Authorities iii

Reasons for Denying the Writ 1

I. The United States Court Of Appeals For The Seventh Circuit Adhered To This Court's Decisions In *City of Boerne v. Flores; Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank;* And *Kimel v. Florida Bd. of Regents* 1

A. For Purposes Of The Fourteenth Amendment, *Cleburne v. Cleburne Living Center, Inc.* Establishes That A Rational-Basis Test Applies To Distinctions Made Because Of Disability 2

B. Title I Of The Americans With Disabilities Act, 42 U.S.C. §§ 12111-17, Imposes Obligations On Employers Which Go Beyond A Rational-Basis Test And Does Not Therefore Enforce The Fourteenth Amendment 4

C. Title I Of The Americans With Disabilities Act, 42 U.S.C. §§ 12111-17, Is Not A Proportional Response To Identified Discrimination Against The Disabled By The State Of Illinois 5

II. The Sole Issue Presented By This Case Will Soon Be Resolved By This Court In *Board of Trustees of the University of Alabama v. Garrett,* No. 99-1240 8

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES:

Alden v. Maine, 527 U.S. 706 (1999) 8

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 1

City of Boerne v. Flores, 521 U.S. 507 (1997) 1, 3

City of Cleburne v. Cleburne Living Ctr., Inc., 437 U.S. 432 (1985) 2, 3

Civil Rights Cases, 109 U.S. 3 (1883) 1

Erickson v. Board of Governors of State Colleges and Univs. for Northeastern Ill. Univ., 207 F.3d 945 (7th Cir. 2000) 3, 4, 8

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) 1, 3, 5, 8

Garrett v. University of Ala. at Birmingham Bd. of Trustees, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S.Ct. 1669 (U.S. Apr. 17, 2000) (No. 99-1240) 9

Gregory v. Ashcroft, 501 U.S. 452 (1991) 2

Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998) 8

Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) 1, 3, 5

New York v. United States, 505 U.S. 144 (1992) 2

Oregon v. Mitchell, 400 U.S. 112 (1970) 1

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 2

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Const. amend. XIV, § 1 3

U.S. Const. amend. XIV, § 5 ..... 2, 3, 5, 8, 9

Ill. Const. art. 1, § 19 6

Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* 1, 5, 8

42 U.S.C. § 12202 2

Illinois Human Rights Act, 775 Ill. Comp. Stat. Ann. § 5/1-101 *et seq.* 6

775 Ill. Comp. Stat. Ann. § 5/1-103(I) 7

775 Ill. Comp. Stat. Ann. § 5/2-101(B)(1)(c) 7

Ill. Rev. Stat. (1921), ch. 23, § 350 *et seq.* 6

Ill. Rev. Stat. (1921), ch. 23, § 357(m) 6

Ill. Rev. Stat. (1957), ch. 24½, § 38b1 *et seq.* 6

Ill. Rev. Stat. (1957), ch. 24½, § 38b3(9) 6

Ill. Rev. Stat. (1975), ch. 38, § 65-21 *et seq.* 6

Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* 4

CONGRESSIONAL HISTORY:

S. Rep. No. 101-116 (1989) 7

MISCELLANEOUS:

R. Davis, *The Illinois Human Rights Act: Revision Of Illinois Law Concerning Discrimination*, 69 Ill. Bar J. 218 (1980) 7

REASONS FOR DENYING THE WRIT

The sole question presented by the Petition of the United States is whether Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-17, is a proper exercise of Congress's power under section 5 of the Fourteenth Amendment.

I.

The United States Court Of Appeals For The Seventh Circuit Adhered To This Court's Decisions In *City of Boerne v. Flores; Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank;* And *Kimel v. Florida Bd. of Regents.*

The Eleventh Amendment divides power vertically between the state and federal governments. *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985). The *Civil Rights Cases,* 109 U.S. 3 (1883) teach us that the Fourteenth Amendment gives Congress the power solely to enforce Constitutional guarantees against the states. Congress's power to enforce is not a power to expand Constitutional guarantees without following the process of amending the Constitution. To paraphrase, "[f]rom the standpoint of the . . . constitutional structure of this Nation, [the ADA] bring[s] us to a pause before we [are carried] to the point of sanctioning Congress's attempt to expand the scope of constitutional rights 'by simple legislation.' " *Oregon v. Mitchell,* 400 U.S. 112, 152 (1970). Because of the divide between the separate sovereign states and the sovereignty of the states as united states "every school child learns, our Constitution establishes a system of dual

sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

To put it in a way that seems particularly applicable to the Americans with Disabilities Act of 1990, "the Constitution protects us from our own best intentions. It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). The divide between dual sovereigns may only be breached when Congress has both unequivocally expressed its intent to cross the divide and acted pursuant to a valid exercise of power. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Although Congress did unequivocally express its intent to abrogate the Eleventh Amendment in 42 U.S.C. § 12202, as the Seventh Circuit correctly held in this case, Congress failed to act pursuant to a valid exercise of its power under section 5 of the Fourteenth Amendment. The reasons why the Seventh Circuit's decision was correct follow.

A. For Purposes Of The Fourteenth Amendment, *Cleburne v. Cleburne Living Center, Inc.* Establishes That A Rational-Basis Test Applies To Distinctions Made Because Of Disability.

The decision of the Seventh Circuit in this case was informed by the three recent decisions of this Court addressing the circumstances under which Congress may properly act in exercise of its legislative power under section 5 of the Fourteenth Amendment: *Kimel v. Florida*

Bd. of Regents, 120 S. Ct. 631 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); and *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *City of Boerne*, this Court wrote that "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law. *City of Boerne v. Flores*, 521 U.S. at 527. This observation was repeated in *Kimel* and *Florida Prepaid Postsecondary Educ. Expense Bd.* In its decision, the Seventh Circuit recognized that "[t]hrice [the Supreme Court] has stressed that the language of § 5, which gives Congress the power to 'enforce' the Fourteenth Amendment, must be taken seriously. Statutes that create new rights, or expand old rights beyond the Fourteenth Amendment's bounds, do not 'enforce' that amendment." *Erickson v. Board of Governors of State Colleges and Univs. for Northeastern Ill. Univ.*, 207 F.3d 945, 947 (7th Cir. 2000).

The outer bounds of Congress's power to treat the disabled as entitled to equal protection under section 1 of the Fourteenth Amendment was set in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) where this Court concluded for several reasons "that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation." A rational-basis test applies to distinctions made because of disability. Just as in *Kimel* concerning distinctions based on age, Congress does not have the naked power *vis-a-vis* the states to legislate a stricter standard of conduct than required by the Equal Protection Clause. Rational distinctions because of disabilities comport with the Constitution.

B. Title I Of The Americans With Disabilities Act, 42 U.S.C. §§ 12111-17, Imposes Obligations On Employers Which Go Beyond A Rational-Basis Test And Does Not Therefore Enforce The Fourteenth Amendment.

The ADA imposes a higher standard than the Constitutionally mandated rational-basis test. It imposes an affirmative duty on the states *qua* employers to reasonably accommodate disabled persons and persons perceived to be disabled within the meaning of that Act. The ADA mandates an affirmative justification for state action. The employment decisions of the State of Illinois are no longer presumptively valid if they are rationally related to the interests at stake. State employees are compelled to implement the reasonable accommodation process imposed by that Act. Only when the State of Illinois shows that it cannot reasonably accommodate a disabled person will it be free from the restrictions of the ADA.

As noted by the Seventh Circuit by requiring that employers accommodate rather than disregard disabilities, the ADA is a cousin to the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.* "Both the RFRA and the ADA replace the Constitution's approach with a prohibition of disparate impact and jettison neutrality in favor of accommodation." *Erickson v. Board of Governors of State Colleges and Univs. for Northeastern Ill. Univ.*, 207 F.3d at 951. The ADA's approach is harder to justify than the approach of RFRA because unlike the Free Exercise Clause, the Equal Protection Clause does not prohibit all intentional discrimination

but only discrimination that cannot pass the rational-basis test.

C. Title I Of The Americans With Disabilities Act, 42 U.S.C. §§ 12111-17, Is Not A Proportional Response To Identified Discrimination Against The Disabled By The State Of Illinois.

Section 5 of the Fourteenth Amendment is an affirmative grant of power to Congress. *See Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631, 644 (2000). Congress could have acted to impose the ADA on the State of Illinois pursuant to the enforcement power of section 5 of the Fourteenth Amendment if there had been a factually based legislative finding that Illinois as a sovereign state was evading the rational-basis test in a way that justified the prophylactic measures of that Act. Decades of legislative experience, years of hearings and study, task forces, surveys and numerous citizen testimonials about discrimination in the private sector are not substitutes for evidence of discrimination by the states. Had there been such evidence the ADA might have been considered a proportional response to invidious conduct. The propriety of any section 5 legislation is judged with reference to historical experience. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 640 (1999). However, the ADA lacks proportionality because the State of Illinois has no legislatively documented history of discrimination against the disabled.

For at least seven decades prior to the ADA Illinois had taken a proactive role with respect to the disabled. In

1919, Illinois adopted an Act in relation to the rehabilitation of physically handicapped persons. Ill. Rev. Stat. (1921), ch. 23, § 350 *et seq.* Among other things, that Act required the Illinois Department of Public Welfare to cooperate with the Illinois Department of Labor in the placement in remunerative employment of physically handicapped persons. Ill. Rev. Stat. (1921), ch. 23, § 357(m). In 1955, Illinois adopted a University Civil Service System. Ill. Rev. Stat. (1957), ch. 24½, § 38b1 *et seq.* Among other things, that Act required the University Civil Service System to provide by its rules for employment at regular rates of compensation physically handicapped persons in positions in which the handicap did not prevent the individual from furnishing satisfactory service. Ill. Rev. Stat. (1957), ch. 24½, § 38b3(9). In 1970, Illinois adopted a new constitution. Article 1, § 19 of the Illinois Constitution provides that: "All person with physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer." Ill. Const. art. 1, § 19. No other state had a comparable constitutional provision in 1970.

Nearly twenty years before the adoption of the ADA Illinois adopted its Equal Opportunity for the Handicapped Act. Ill. Rev. Stat. (1975), ch. 38, § 65-21 *et seq.* That Act made it unlawful for any employer to discriminate in hiring, discharge, or otherwise against any person because of a physical or mental handicap. Ill. Rev. Stat. (1975), ch. 38, § 65-25. Ten years prior to the adoption of the ADA Illinois consolidated numerous pre-existing

anti-discrimination laws and created a uniform enforcement procedure. *See* R. Davis, *The Illinois Human Rights Act: Revision Of Illinois Law Concerning Discrimination*, 69 Ill. Bar J. 218 (1980). Illinois' new law is known as the Illinois Human Rights Act. 775 Ill. Comp. Stat. Ann. § 5/1-101 *et seq.* That Act prohibits discrimination against persons with determinable physical or mental characteristics, a history of such characteristics, or when there is a perception of such characteristics by the person complained against. 775 Ill. Comp. Stat. Ann. § 5/1-103(I). The State of Illinois and its political subdivisions, municipal corporations and other governmental units and agencies, without regard to the number of persons they employ, are all subject to the provisions of that Act. 775 Ill. Comp. Stat. Ann. § 5/2-101(B)(1)(c).

That the State of Illinois was far ahead of Congress in providing constitutional and statutory protections for the disabled is not a unique circumstance. The legislative history of the ADA unequivocally establishes that similar conditions existed in virtually all the states. A Senate Report remarked that "[v]irtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life." S. Rep. No. 101-116, at 84 (1989). That Senate Report noted that "[a]ll states currently mandate accessibility in newly constructed state-owned public buildings. . . . " *Id.* at 92. That Congress thought it important to provide a uniform remedy as an alternative to the multiple remedies provided by the states is not a sufficient justification for abrogation of the Eleventh Amendment. Different state remedies addressing a core social problem are common. What is unique is that Congress would use a history of proactive conduct

and multiple remedies provided by the states as a justification for circumventing the Eleventh Amendment. The goal of providing a uniform remedy does not have a foundation in the Fourteenth Amendment.

This is not to suggest that section 5 of the Fourteenth Amendment requires that egregious predicates exist before Congress may exercise its power. However, the resulting statute must be narrowly tailored to remedy a state's failing. *See Florida Prepaid,* 527 U.S. at 639. The decision of the Seventh Circuit correctly states that the legislative findings of the ADA (42 U.S.C. § 12101) contain not a word about state governments. Nothing in the legislative findings or the debates preceding adoption of the ADA shows that Illinois, or any other state government, engaged in practices that prevented victims of irrational discrimination from obtaining a remedy. *Erickson,* 207 F.3d at 951-52. To enforce a federal law against Illinois in federal courts when Illinois has a history of protecting the disabled is to defy logic. To find that Congress could use its section 5 power despite the proactive efforts of the State of Illinois would only heighten "lingering concerns about the extent of the national power." *Alden v. Maine,* 527 U.S. 706, 713-14 (1999).

II

The Sole Issue Presented By This Case Will Soon Be Resolved By This Court In *Board of Trustees of the University of Alabama v. Garrett,* No. 99-1240.

The reason for granting the Petition proffered by the United States is that this Court has granted review in

Garrett v. University of Ala. at Birmingham Bd. of Trustees, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S.Ct. 1669 (U.S. Apr. 17, 2000) (No. 99-1240), concerning the same issue presented here. The decision of the United States Court of Appeals for the Eleventh Circuit in *Garrett* mistakenly followed its decision in *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir. 1998), *rev'd*, 120 S.Ct. 631 (2000), holding that Congress properly exercised its power under section 5 of the Fourteenth Amendment in adopting the ADA. In this case, the Seventh Circuit correctly held that Congress did *not* properly exercise its power under section 5 of the Fourteenth Amendment. When this Court reverses *Garrett* there will be nothing more to add by reviewing this case.

CONCLUSION

For the foregoing reasons, the Respondent urges this Court to deny issuance of a writ of certiorari.

Respectfully submitted,

MARK T. DUNN
Counsel of Record
DUNN, STANCZAK & WILLARD
1001 North Main Street
Bloomington, IL 61702-3488
(309) 828-6241

CHRISTIAN M. POLAND
ROSS & HARDIES
Suite 2500
150 North Michigan Avenue
Chicago, IL 60601-7567
(312) 750-5753

Counsel for Respondent